

ONYEKE ALPHAEUS ONYEKE

V.

- 1. PEOPLES DEMOCRATIC PARTY (PDP)**
- 2. INDEPENDENT NATIONAL ELECTORAL COMMISSION**
- 3. HON. IFEANYI LAWRENCE UGWUANYI**
- 4. DR. SAMUEL MADUKA ONYISHI**
- 5. SENATOR AYOGU EZE**

SUPREME COURT OF NIGERIA

SC.128/2018

MARY UKAEGO PETER ODILI, J.S.C. (Presided)

AMINA ADAMU AUGIE, J.S.C.

EJEMBI EKO, J.S.C

PAUL ADAMU GALUMJE, J.S.C. (Read the Leading Judgment)

SIDI DAUDA BAGE, J.S.C.

THURSDAY, 21ST FEBRUARY 2019

*APPEAL - Ground of appeal - Classification of as ground of law or mixed law and facts
Determination of.*

*ELECTION - Pre-election matter - Appeal thereof – Determination of - Limitation period
therefor - Section 285(12), 1999 Constitution.*

*INTERPRETATION OF STATUTES- Statutory provisions - Statute making alteration in
procedure - Interpretation of – Whether can be interpreted retrospectively.*

*LIMITATION LAW- Limitation of action - Pre-election matter - Appeal thereof -
Determination of - Limitation period therefor - Section 285(12), 1999 Constitution.*

*LIMITATION OF ACTION - Limitation Law Appeal thereof - Determination of- Limitation
period therefor - Section 285(12), 1999 Constitution.*

PRACTICE AND PROCEDURE - *Appeal - Ground of appeal - Classification of as ground of law or mixed law and facts - Determination of.*

STATUTE - *Statutory provisions - Statute making alteration in procedure - Interpretation of - Whether can be interpreted retrospectively*

Issue:

Whether or not the appellant's notice of appeal was statute barred since it was not heard within 60 days as provided by section 285(12) of the Constitution (as altered).

Facts:

The appellant, the 3rd, 4th and 5th respondents were members of the 1st respondent, a political party. They paid for and were issued with the 1st respondent's expression of interest for gubernatorial nomination form for Enugu State that was slated for 8th December 2014

Prior to the gubernatorial primary election, ward congress were conducted by the 1st respondent throughout the state and the successful candidates were listed as delegates to the primary election.

However, before the conduct of the primary election, the appellant alleged that the chairman of the panel that was to conduct the primary election had openly in a meeting with the aspirants stated that the list of delegates given to him was different from the court's sanctioned list of delegates. The appellant along with some delegates moved away from the venue of the primary to some other place and claimed that the delegates as sanctioned by the court had elected him as the gubernatorial candidate. When the 1st respondent forwarded the name of the 3rd respondent as the elected candidate for the gubernatorial election, the appellant became unhappy and commenced action in court.

The respondent opposed the action and filed a preliminary objection contesting the competence of the suit on the ground that the appellant lacked the locus standi to file the action. At the conclusion of hearing, the court upheld the objection and dismissed the suit.

Dissatisfied with the decision of the trial court, the appellant appealed to the Court of Appeal which dismissed the appeal.

Further aggrieved, the appellant appealed to the Supreme Court. The appellant's notice of appeal was filed on the 15th of February 2018. Being a pre-election matter, it preceded the

governorship election of 2015 and was therefore caught by section 285(12) of the 1999 Constitution of the Federal Republic of Nigeria as altered by the Fourth Alteration Act No.21 of 2017 which took effect from 17th June 2018,

Held (Unanimously striking out the appeal):

1. On Limitation period for determination of appeal on pre-election matter -

By the provisions of section 285(12) of the 1999 Constitution, as altered by the Fourth Alteration Act, an appeal on pre-election matter must be heard and concluded within 60 days from the day it was filed. Where the matter becomes pending for more than 60 days it becomes statute-barred. In the instant case, the appeal was filed on 15th February 2018 and was pending for more than 60 days. In the circumstance, it became statute-barred and was struck out. [Ojokolobo v Alamu (1987) 3 NWLR (Pt.61) 377 referred to.] (Pp. 470-471, paras. H-B 471, paras. D-E; 477, paras. E-P)

2. On Whether Statute making alterations in procedure can be construed retrospectively -

A statute making provisions for time within which Judicial proceedings can be taken is retrospective. The alteration in section 285 by the 4th Alteration Act, No.21, 2017 is essentially procedural, and therefore has retrospective effect on all pending pre-election matters that have lived beyond 60 days. In the instant case, the appeal was statute barred because was pending for more than 60 days. (Pp. 477-478, paras. F-A)

3. On Principles guiding classification of rounds of appeal-

Where the complaint is that there was no evidence or no admissible evidence upon which a finding or decision was based, same is regarded as a ground of law. If a Judge considers what is not before him and relies on it for the exercise of his discretion, he will be exercising same on wrong principles and that will be a question of law. On the other hand, a question of mixed law and facts will prevail where the facts struggle with the law for the first place in the ground of appeal not because some infinitesimal facts edify the law. [NNPC v Famfa Oil Ltd (2012) 17 NVLR (Pt. 1328) 148; Newswatch Comm. Ltd. v. Atta (2006) 12 NWLR (Pt. 993) 144 referred to.] (P. 476, paras. E-H)

Nigerian Cases Referred to in the Judgment:

Akwiwu Motors Ltd. v. Sangouga (1984) 5 SC 184
Braithwaite v. Dalhatu (2016) 13 NWLR (Pt.1528) 32
Ekunola v. CBN (2013) 15 NWLR (Pt.1377) 224
Iyoho v. Efiog (2007) 11 NWLR (Pt. 1044) 31
K.R.K. Holdings Nig. Ltd. v FBN Lid. (2017) 3 NWLR (Pt. 1552) 326
K.T.P. Ltd. v. G & H(Nig.) Ltd. (2005) 13 NWLR (Pt.943) 680
Maigoro v. Garba (1999) 10 NWLR (Pt.624) 555
Newswatch Comm. Ltd, v. Atta (2006) 12 NWLR (Pt. 993) 144
NNPC v. Famfa Oil Ltd. (2012) 17 NWLR (Pt. 1328) 148
Ogbechie v Onochie (No. 1) (1986) 2 NWLR (Pt.23) 484
Ogunyade v Oshunkeye (2007) 15 NWLR (Pt.1057) 218
Ojemen v Momodu (1983) 1 SCNLR 188
Ojokolobo v. Alamu (1987) 3 NWLR (Pt. 61) 377
Olaniyi v Aroyehun (1991) 5 NWLR (Pt. 194) 652
Toyin v. Peoples Democratic Party (2019) 9 NWLR (Pt. 1676) 50
U.B.N. Ltd. v. Edionseri (1988) 2 NWLR (Pt. 74) 93

Foreign Case Referred to in the Judgment:

The Republic of Costa Rica v. Erlanger (1974) 3 Ch.D.62

Nigerian Statutes Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria, 1999 (as amended), S. 233(1), (2) & (3)
Constitution of the Federal Republic of Nigeria as altered by the Fourth Alteration Act, No. 21 of 2017, S. 285(12)

Appeal:

This was an appeal against the judgment of the Court of Appeal which dismissed the appellant's appeal. The Supreme Court in a unanimous decision struck out the appeal.

History of the Case:*Supreme Court:*

Names of Justices that sat on the appeal: Mary Ukaego Peter-Odili, J.S.C. (Presided); Amina Adamu Augie, J.S.C.; Ejembi Eko, J.S.C.; Paul Adamu Galumje, J.S.C (*Read the Leading Judgment*); Sidi Dauda Bage, J.S.C. Appeal No: SC.128/ 2018

Date of Judgment: Thursday, 21st February 2019

Names of Counsel: J.C. Dappa (with him, Ikechukwu Onyimba, Esq. and O.I Chime, Esq) -for the Appellant Dr. Onyechi Ikpeazu, SAN (with him, Abdul Mohammed, Esq., Tobeckwu Nweke Esq; Obinna Onya, Esq. and Julius MBA, Esq.) -for the 1st Respondent

Alhassan A. Umar, Esq. (with him, M.O. Edriawe, Esq.) - for the 2nd Respondent

P.IN. Ikwueto, SAN (with him, Tochukwu Odo, Esq.; C.I. Onwumelie, Esq. and Alex Ukwueze, Esq.) Jor the 3rd Respondent

Alex Akoja, Esq. (with him, Adesina Agbede, Esq.; Nnamdi Akuneto, Esq.; Adesuwa Adegbike, Esq. and A.F. Kehinde, Esq.) - for the 5th Respondent 4th Respondent not represented

Court of Appeal:

Division of the Court of Appeal from which the appeal was brought: Court of Appeal, Abuja

Names of Justices that sat on the appeal: Tinuade Akomolafe - Wilson, J.C.A. (Presided); Emmanuel Akomaje Agim, J.C.A.; Mohammed Mustapha, J.C.A. Appeal No.: CA/A/77/2017

Date of Judgment.: Tuesday, 17th November 2017

Names of Counsel: Chief Henry Akunebu (with him Sunday N. Ezema, Esq. and Ruth Eze [Mrs.]) - for the Appellant

Dr. Onyechi Ikpeazu, SAN (with him, Alex Ejiesieme, Esq. and Chidinma Nweke [Miss]) for the 1st Respondent

Tanimu Inuwa, Esq. (with him, Alhassan A. Um Ukpane [Mrs.]; E.T. Abaje and Bashir M. Abubakar the 2nd Respondent

P.I.N. Ikwueto, SAN (with him, C.I. Mbaeri, Esq. and Gift Maduka, Esq.) - for the 3rd Respondent

A.O. Usman, Esq. (with him, Damola Oni) - for the 5th Respondent.

High Court:

Name of the High Court: Federal High Court, Abuja

Name of the Judge: Chukwu, J.

Suit No.: FHC/ABJ/CS/152/2015

Date of Judgment: Tuesday, 19th April 2016 of Counsel: Victor Opara, Esq. (with him, S.N. Ezema, Esq.) - for the Plaintiff

Tochukwu Nweke, Esq. (with him, Nwamaka Ofoegbu) for the 1st Defendant

Ibrahim K. Bawa, SAN (with him, F.M. Muwa, Esq

Hauwa S. Mohammed [Mrs.], Olawale Dawodu, Esq. and Chiamaka Ohakim [Miss]) - for the 2nd Defendant

PL.N. Ikwueto, SAN (with him, Tochukwu Odo; C.I. Onwumelie; C. Ogbuefi, Esq.; O. D. Soyebbo and M.U. Odimegata) -for the 3rd Defendant

Counsel:

J.C Dappa (with him, Ikechukwu Onyimba, Esq. and O.I Chime, Esq.) - for the Appellant

Dr. Onyechi Ikpeazu SAN (with him, Abdul Mohammed, Esq.; Tobechukwu Nweke Esq.; Obinna Onya, Esq. and Julius MBA, Esq.) - for the 1st Respondent

Alhassan A. Umar, Esq. (with him, M.O. Edriawe, Esq.) - for the 2nd Respondent

P.I.N Ikwueto, SAN (with him, Tochukwu Odo, Esq.; C.I Onwumelie, Esq. and Alex Ukwueze, Esq.) - for the 3rd Respondent

Alex Akoja, Esq. (with him, Adesina Agbedem, Esq.; Nnamdi Akuneto, Esq.; Adesuwa Adegbike, Esq. and A.F Kehinde, Esq.) - for the 5th Respondent 4th Respondent not represented

GALUMJE, J.S.C. (Delivering the Leading Judgment): The appellant herein, as well as the 3rd, 4th and 5th respondents are members of the 1st respondent, a political party registered by the 2nd respondent. They all paid for and were issued the 1st respondent's expression of interest for Gubernatorial Nomination Form which would allow them contest the primary election for Enugu State that was slated for 8th of December 2014. In addition, each of them paid for and

was issued the 1st respondent's Nomination Form for Gubernatorial Primary Election 2014. They completed both forms and submitted them to the 1st respondent.

Before the Gubernatorial primary election, ward congresses elections were conducted by the 1 respondent throughout Enugu State and the successful candidates were listed as delegates to the primary election.

For whatever reason, one Chinenye Godwin and 2 other persons who sued on behalf of all the delegates sought for and obtained an order in suit No. FHC/ABJ/CS/830/2014 approving the list of the delegates so elected at the ward congresses as the authentic list to be used for the primary election.

The National Executive Committee of the 1st respondent on the recommendation of its National Working Committee appointed a five-man panel comprising of King A. Asara as chairman, and Barrister Saratu Umar, Engr. Adamu Adeyemi, Enugu State nairman of PDP, and Barr. Ukpai Ukairo as secretary to proceed Enugu to conduct the 1st respondent's primary election. Party members assembled at the Nnamdi Azikiwe stadium, venue of the primary Election. The appellant who alleged that the chairman of panel had in a meeting with aspirants and the gubernatorial primary election panel openly stated that the list of delegates given to him by the first respondent for the conduct of the primary election was totally different from the court's sanctioned list of delegates declined to participate in the primary election. He along with other delegates moved away from the venue of the primary election and assembled at 82 Army Battalion Recreation ground Enugu where he claimed that the delegates as sanctioned by the court elected him as the gubernatorial candidate of the 1st respondent forwarded the name of the 3rd respondent as the elected candidate for the gubernatorial election in Enugu State, the appellant was not happy. Being aggrieved, he commenced action at the Federal High Court Abuja by filing an originating summons on the 23rd December, 2015 in which he raised five questions for the trial court's determination and thereafter claimed five reliefs as reflected at pages 3-4 of the printed record of this appeal.

The 1st, 2nd and 3rd respondents filed counter affidavits in opposition to the appellant's originating summons. Thereafter the 1st and 3rd respondents issued preliminary objections to the competence of the suit, on the ground that the appellant had no locus standi to institute the action.

The trial court heard the preliminary objections and in a reserved and well considered ruling, delivered on the 19th April, 2016, Chukwu J. upheld the preliminary objection and dismissed the suit which he said was an abuse of court process.

Once again, the appellant was not satisfied with the decision of the trial court. Being aggrieved, he appealed to the Court of Appeal, Abuja Division. The appeal was heard and in a unanimous decision by the three Justices of that court, (Coram, Timade Akomolafe Wilson, Emmanuel Akomaye Agim, and Mohammed Mustapha, JJ.CA) is appeal was dismissed with costs of N100,000.00 against him and in favour of the 1st, 2nd and 3rd respondents.

The instant appeal is against the decision of the Court of appeal. The appellant's notice of appeal was filed on the 15th February 2018.

From the facts of this case. it is very clear that the subject matter of this appeal preceded the Governorship election or in Enugu State. It is therefore a pre-election matter. The appellants notice of appeal was file on the 15th of February, 2018. By Virtue of section 285(12) of the 1999 Constitution of the Federal Republic of Nigeria, as altered by the Fourth Alteration Act No. 21 or 2 which took effect from 17th June, 2018 this appeal should have been heard and concluded within 60days from the day it was filed. For avoidance of doubt, this section of the Constitution provides as follows: -

“An appeal from the decision of a court in a pre- election matter shall be heard and disposed of within 60 days from the date of filing of the appeal”

In *Obayemi Toyin v. Peoples Democratic Party & Ors.* (unreported Appeal No.308/2018), (2019) 9 NWLR (Pt. 1676) 50 this court declared the notice appeal which was filed on the 23rd March, 2018 statute barred since it was not heard within 60 days, as provided by section 285(12) of the Constitution (as altered). This court relied on the English case of *The Republic of Costa Rica v. Erlanger* (1974) 3 Ch.D.62 where it was held that the presumption against retrospective construction has no application to enactments which only affect procedure and practice of courts, as no person has a vested right in the course of procedure. The alteration to section 285 by the 4th Alteration Act No.21, 2017 is essentially procedural and therefore has retrospective effect on all pending pre-election matters that have lived beyond 60 days. This appeal having filed on the 15th of February 2018, has been so pending for more than 60 days. It is therefore statute barred and liable to be struck out. Accordingly, same is hereby struck out for want of jurisdiction by this court.

PETER-ODILI, J.S.C.: I agree with the judgment just delivered by my learned brother, Paul Adamu Galumje, JSC and to underscore the support I have in the reasoning's from which the decision came about, shall make some remarks.

This is an appeal against the judgment of the Court of Appeal, Abuja Division or court below or lower court, Coram: Tinuke Akomolafe - Wilson, Emmanuel Akomaye Agim and Mohammed Mustapha JJCA, delivered on the 17th day of November, 2017 wherein the court below dismissed the appeal of the appellant for lacking in merit while it upheld the decision of the trial Federal High Court of 19th April, 2016 resolved that only the National Executive of the 1st respondent can conduct primaries for the nomination of its Enugu State Governorship candidate and that as appellant did not participate in the said primaries he lacked the locus standi to challenge the same.

The facts of this case are well captured in the leading judgment and no useful purpose will be derived in repeating the same unless when the occasion warrants a reference to any part thereof.

On the 28th day of November 2018, date of hearing, learned counsel for the appellant, J. C. Dappa adopted the brief of argument filed on 12/4/2018 in which were distilled four issues for determination which are as follows: -

- 1) Whether or not in the circumstances of this case the appellant can be said to have withdrawn from the primary election that produced the 3rd respondent as gubernatorial candidate. (Ground 2).
- 2) Whether or not, having regard to the appellant's affidavit, the court below was right to say that the appellant changed the factual basis of his claim. (Ground 4).
- 3) Whether or not, having regard to the substantive case of the appellant that the primaries that produced the 3rd respondent was invalid, it was proper to determine the issue at interlocutory stage and deny the appellant the opportunity of proving his claim. (Ground 3).
- 4) Whether or not the court below was right to validate the primary election that produced the 3rd respondent and which was conducted exclusive of the court affirmed delegates, having held that the delegates list affirmed by one earlier decision of the Federal High Court still subsisting and effective at the time of the said primary election. (Grounds 5 and 6).

Learned senior advocate for the 1st respondent, Dr. Onyech Ikpeazu adopted the brief of argument filed on 26/6/2018 and deemed filed on 7/11/18. Also, a list of additional authorities filed on 7/11/2018 and raised three issues for determination in the event that the preliminary objection, raised and argued in the brief of argument failed. The issues are thus: -

- 1) Whether the Court of Appeal was correct when it upheld the decision of the High Court to the effect that the appellant lacked the requisite locus standi to present the suit having by his deposition withdrawn from the primary election conducted at the instance of the 1st respondent. (Grounds 2 and 3).
- 2) Whether the Court of Appeal was correct in its holding that the appellant, at the appellate court altered the case which he presented in the originating summons. (Ground 4).
- 3) Whether the Court of Appeal was correct in its interpretation of the import of the earlier decision of the Federal High Court in FHC/ABJ/CS/816/2014 and its bearing in the appellant's originating summons. (Grounds 5 and 6).

Learned counsel for the 2nd respondent, Alhassan A. Umar, Esq. adopted the brief of argument settled by T. M. Inuwa, Esq. and filed on 22/6/2018 and in it was identified one single issue for determination which is thus: -

Whether having regard to the provision of section 87 (4) (c) and 9 of the Electoral Act, 2010 (as amended) and the decisions of this honourable court on the scope of same, the Court of Appeal was right to have upheld the decision of the trial Federal High Court that the appellant lacked the locus standi to institute the action. (Ground One).

P. I. N. Ikwueto, SAN for the 3rd respondent adopted his brief of argument filed on 4/10/2018 and deemed filed on 7/11/2018. He raised and argued a preliminary objection to the appeal and in the alternative distilled three issues for determination, viz: -

- i. Whether the court below was right when it affirmed the findings/decision of the trial court that the appellant lacked the locus standi to institute this suit, the appellant having admitted in his affidavit in support of the originating summons that he withdrew and did not participate in the one and only primary election conducted and approved by the National Executive Committee of the 1st respondent. (Grounds 2 and 3).
- ii. Whether the court below was right when it held that the appellant changed the factual basis of his claims on appeal. (Ground 4).

- iii. Whether the court below was right in the interpretation of the import and effect of the decision of Ademola, J. in FHC/ABJ/CS/816/2014 on the instant suit. (Grounds 5 and 6).

The 4th respondent did not file any brief.

For the 5th respondent, learned counsel, Alex Akoja, SAN adopted his brief of argument settled by Yusuf Ali, SAN and filed on 14/11/18 and deemed filed on 28/11/18. He raised two issue for determination which are thus: -

- 1) Whether or not, in the circumstances of this case the appellant can be said to have withdrawn from the primary election that produced the 3rd respondent as gubernatorial candidate.
- 2) Whether or not, having regard to the appellant's affidavits, the court below was right to say that the appellant changed the factual basis of his claim.

It needs no saying that the preliminary objection raised by 1st and 3rd respondents would be tackled first before venturing further since the competence of the appeal and jurisdiction of the court depend on that.

Preliminary Objection

The objection of the 1st respondent is centred on grounds 2, 5 and 6 of the grounds of appeal not being competent and to be struck out for being grounds of fact or mixed law and facts requiring the leave of the Court of Appeal or the Supreme Court and since no leave was secured, the appeal on those grounds which are invalid.

The grouse of the 3rd respondent being that the appeal is an abuse of court process and should be struck out.

The response of the appellant are in the reply briefs.

Dr. Onyechi Ikpeazu, SAN for the 1st respondent/objector stated that in ground 2 the complainant against the findings of fact said to be made by the Court of Appeal was further amplified only exercise jurisdiction as of right where the ground of appeal in the particulars of error where the appellant further complained that the court below misapplied the facts deposed to in the affidavit of the respondents.

That ground five complained against the conclusion reached by the Court of Appeal which are matters of mixed facts and law.

That ground six the complaint is that the judgment was against the weight of evidence which is not a ground of pure law.

Learned counsel stated that by the combined effect of section 233 (1) (2) (a) and (3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) the Supreme Court can only exercise Jurisdiction as of right where the ground of appeal involves questions of law alone and the converse where the grounds involves issues of fact or mixed law and facts, the appeal shall be either by leave of Court of Appeal or he Supreme Court and without the leave of the court, lacks jurisdiction to embark upon the adjudication. He cited *K.T.P Ltd. v. G& H (Nig) Ltd.* (2005) 13 NWLR (Pt.943) 680; *Ojemen v. Momodu II* (1983) 1 SCNLR 188 at 205; *Maigoro v. Garba* (1999) 10 NWLR (Pt.624) 555 at 568; *Akwiwu lotors Ltd. v. Sangonuga* (1984) 5 SC 184 at 188; *Ekunola v. CBN* (2013) 15 NWLR (Pt.1377) 224 at 260.

Learned senior counsel for the 3rd respondent contended that this court is prevented from attending to this appeal as it is an abuse of court process as the appellant did not appeal against the concurrent decisions of the two lower courts that the instant suit constitutes an abuse of court process. He referred to part of the judgment of the trial court and excerpts from that of the court below.

He cited *Ogunyade v Oshunkeye* (2007) 15 NWLR (Pt.1057) 218 at 257; *K.R.K. Holdings Nig. Ltd. v. FBN Ltd.* (2016) 12 SC (Pt.II) 85 at 95, (2017) 3 NWLR (Pt. 1552) 326; *Iyoho v. Effiong* (2007) All FWLR (Pt. 374) 204 at 223, (2007) 11 NWLR (Pt. 1044) 31; *Braithwaite v Dalhatu* (2016) 13 NWLR (P.1528) 32 at 652 etc.

That the appeal has become academic which this court does not entertain. He referred to *Union Bank of Nigeria Ltd. v. Edionseri* (1988) 1 NSCC 603 at 610-611; (1988) 2 NWLR (Pt. 74) 93; *Olaniyi v Aroyehun* (1991) 7 SC (Pt.1) 1 at 50, (1991) 5 NWLR (Pt. 194) 652.

Responding, learned counsel for the appellant, J. C. Dappa, Esq. submitted that the decision appealed against arose from the determination of a preliminary objection based on admitted facts as contained in the originating summons and so the issue of facts or mixed law and facts do not arise. That both the trial court and the court below relied on documentary evidence and interpretation thereof. He cited *Ogbechie v. Onochie* (No. 1) (1986) 2 NWLR (Pt.23) 484; *NNPC v Famfa Oil Ltd.* (2012) LPELR-7812 (SC), 2012) 17 NWLR (Pt. 1328) 148; *Newswatch Comm. Ltd. v. Atta* (2006) LPELR (1986) SC pages 19-20, (2006) 12 NWLR (Pt. 993) 144.

Mr. Dappa of counsel for appellant submitted that there was no abuse of court process.

This objection is raised and argued on the ground that grounds 2,5 and 6 of the appellant's notice of appeal were incompetent being mixed law and facts or pure facts. It seems to me strange in view of the fact that the case was initiated by originating summons and fought through affidavit evidence and no hint of oral evidence in view. The claim at the trial court was primarily for the interpretation of the Electoral Act, the Constitution of the 1st respondent in regard to compliance with the guidelines for the primaries and whether primary election that produced the 3rd respondent was conducted in accordance with the requirements of the Electoral Act, the 1st respondent's constitution and its guidelines. Also the claim had to do with the authenticity or validity of the primary election that produced the 3rd respondent as winner conducted without the use of a delegates list or participation of the ward delegates elected in line with the party's guidelines whose election as delegates was declared valid or affirmed by the judgment of the Federal High Court, Abuja.

The crucial point for our purpose now is that the decision subject of the appeal before this court now arose from the determination of a preliminary objection based on admitted facts as contained in the originating summons. Also to be noted is that both the trial court and court below relied on documentary evidence and the interpretation thereof which appeal is centred on exhibit PDP1 and its effect or interpretation which in my humble view cannot be classified as facts or mixed law and facts but rather of pure law. In this regard, I shall refer to the case of *NNPC v Famfa Oil Ltd.* (2012) LPELR-7812 (SC), (2012) 17 NWLR (Pt. 1328) 148 wherein this court held thus: -

“Where the complaint is that there was no evidence or no admissible evidence upon which a finding or decision was based, same is regarded as a ground or law. If a Judge considers which are not before him and relied on them for the exercise of his discretion, he will be exercising same on wrong principles and this will be a question of law”.

In *Newswatch v. Atta* (2006) LPELR (1986), (2006) 12 NWLR (Pt. 993) 144 SC per Tobi, JSC stated thus: -

“Putting the position nakedly, a question of mixed law and facts will prevail where the facts struggle with law for first place in the grounds of appeal, not because some infinitesimal facts edify the law. Let courts of law not over blow this aspect of adjectival law which is really fluid and therefore difficult to apply practice. A little grain of fact in the law should not tilt the position to straight mixed law and facts. That will leave our adjectival law in this area highly polarized and cannot be policed or handled effectively”.

See also *Ogbechie v. Onochie* (No. 1) (1986) 2 NWLR (Pt. 23) 484.

Though the issue was not raised in the preliminary objection, but the court cannot ignore what has become commonplace in these times occasioned by the provisions of section 285 (12) of the 1999 Constitution (as amended) as the appeal before the court has not been determined within 60 days and so clearly the appeal is statute barred.

The option open to the court at this point, in the light of this constitutional eruption is to end the process without much ado.

Therefore, as I said earlier, the appeal being statute barred, the jurisdiction of the court automatically ousted and so the appeal is struck out.

AUGIE, J.S.C.: I read in draft the lead Judgment just delivered by my learned brother, Galumje, JSC, and I agree with him that this appeal is statute barred. By virtue of section 285 (12) of the Constitution, as altered by the Fourth Alteration Act No. 21 of 2017, this appeal should have been heard and concluded within 60 days from the date it was filed. Yes, the subject matter of the appeal preceded the Governorship Election of 2015, and the said Fourth Alteration Act came into effect in 2018, however, it is settled that the law affecting procedure is retrospective.

See *Ojokolobo v. Alamu* (1987) 3 NWLR (Pt. 61) 377 at 396- 397, wherein this court per Bello, CJN., observed as follows on this issue

A statute making provisions for “time” within which judicial proceedings can be taken is retrospective. I cannot see any good reason why a statute prescribing the time within which a court should dispose of proceedings ought not be so construed.

So, alterations in procedure are retrospective, and applying the rule of stare decisis, and guided by the principle in *Ojokolobo v. Alamu*, this court took a firm stand on the effect of the Fourth Alteration Act and struck out the appeals relating to pre-elections matters, including SC.308/2018: *Obayemi Toyin v. PDP & Ors.*, struck out on 18/1/2019.

This Appeal relating to a pre-election matter, has been pending for more than 60 days; it is statute barred, and must suffer the same fate.

The appeal is, therefore, struck out:

EKO, J.S.C.: I had a preview of the judgment just delivered by my learned brother, Paul Adamu Galumje, J.S.C. I do not have anything further to add to it. Accordingly, I adopt the judgment, including all the orders made therein.

Appeal dismissed.

BAGE, J.S.C.: I have had the benefit of reading in draft the lead judgment of my learned brother, Paul Adamu Galumje, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. The appeal having filed more than 60 days, is therefore statute barred and liable to be struck-out. Accordingly, the appeal is hereby struck out.

Appeal struck out.